Supreme Court, U. S.
FILED
FEB 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1280

JULIUS C. WERBROUCK, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. .....

JULIUS C. WERBROUCK, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

The Petitioner, Julius C. Werbrouck, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on November 22, 1978 and the denial of Petitioner's Petion for Rehearing and Rehearing *En Banc* entered on December 22, 1978.

OPINION BELOW

The Petitioner, Julius C. Werbrouck, Jr., was found guilty of violating 18 U.S.C. §§ 2 and 1955 in a jury trial before the Honorable Judge Allen Sharp on September 2, 1977, in the

United States District Court for the Northern District of Indiana, South Bend Division, in Cause No. S 77-Cr-8. On October 21, 1977, the District Court imposed a two-year suspended sentence upon Petitioner, together with a fine of $20,000.00.

Petitioner filed his timely Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. On November 22, 1978, that court affirmed the District Court decision, and on December 22, 1978 denied a Petition for Rehearing and Rehearing En Banc. On January 18, 1979 this court entered its order extending the time to file a Petition for Writ of Certiorari to and including February 19, 1979. Copies of the Appellate Court Opinion, the Order denying rehearing and the Order extending the time to file a Petition for Writ of Certiorari are included in the Appendix hereto.

JURISDICTION

The Judgment that is sought to be reviewed is the final order issued in the United States Court of Appeals for the Seventh Circuit on November 22, 1979 and the subsequent denial of rehearing. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The issues presented for review in this Petition for Certiorari are:

1. Was petitioner denied his Constitutional and statutory right to a trial jury selected at random from a fair cross-section of the community when the District Court summarily excluded twenty-three prospective jurors who answered in the affirmative that they had "read . . . about this defendant or this case in the South Bend Tribune or in any other newspaper . . ."?

2. Was there sufficient evidence to sustain petitioner's conviction with respect to his participation in any gambling operation, consisting of not less than five persons, and for a period of not less than thirty days?

STATEMENT

To a large extent, the evidence in this case was virtually undisputed. The principal points in controversy were petitioner's knowledge of and participation in certain gambling operations, and whether those operations were of sufficient duration to constitute a violation of 18 U.S.C. § 1955. The Government's evidence indicated that a gambling operation featuring blackjack and dice was in operation in the basement of a residence on West Street in the City of Mishawaka, Indiana from approximately July 7, 1976 through January 12, 1977. Additionally, it was shown that this operation was ceased and resumed at Rooms 315, 317 and 319 of the Holiday Inn in Mishawaka, where the games operated from January 17, 1977 until January 26, 1977 (a period of nine days). This Holiday Inn was owned and operated by petitioner, who had resided in Room 317 for several years prior to January of 1977 when he moved directly below these rooms to Room 217, where new facilities had been built for him.

During the period in which Rooms 315, 317 and 319 were occupied by those involved in the gambling operation, they were not paid for on a daily basis. In fact, motel records revealed that no payment had been made for these rooms during January of 1977. Further, customers within were provided with food from the Lincoln Highway Inn Restaurant, which was also owned by petitioner and adjoined the Holiday Inn. Defense witnesses testified, however, that the rooms were, in fact, leased to one Sam Campagna who indicated that he wanted to run a wholesale jewelry operation. Petitioner testified that he was in

no way involved in the gambling operation which was apparently run by Campagna, and he produced signed copies of the lease agreements.

Prior to occupation by Campagna, Rooms 315, 317 and 319 were altered in several respects. The building maintenance engineer employed by Campagna was engaged to relocate a doorway, construct a wall, and install lights and a steel door. An electrician installed an electronically controlled locking device, which was controlled from inside the room, in the secondary steel door and the front door of Room 319. He also installed an intercom, a television monitor, and cameras in the entrance area to Room 319.

Upon this undisputed evidence, in addition to a substantial amount of contradictory and inconclusive testimony, petitioner was convicted of violating 18 U.S.C. §§ 2 and 1955.

Since one of the issues involves the exclusion of certain prospective jurors, a brief summary of the circumstances giving rise to this issue follows.

In his initial voir dire of the jury panel, the trial judge asked: "How many of you have read anything about this defendant or this case in the South Bend Tribune or any other newspaper?". All those jurors responding affirmatively were then excused by the court (Tr. Trans. 34-37). The court then asked: "Have any of you other than those who have just left heard or read about this case in anyway from any other media, any other newspaper, the television or radio, or received any other information about this case other than what you have heard here today from me in the course of these proceedings?". Again, all those responding affirmatively were excused (Tr. Trans. 38-40). A total of twenty-three prospective jurors were thereby excused, most of whom resided in the County in which petitioner resided.

REASONS FOR GRANTING THE WRIT

I

This Case Presents an Excellent Opportunity for the United States Supreme Court, in Its Capacity as Supervisor of the Federal Judiciary, to Settle the Important and Difficult Question as to the Permissibility of Exclusions of an Entire Geographic Group in the Formation of Federal Jury Panels.

Under the circumstances of the instant case, the trial court's position excluding any prospective juror who had "heard or read anything about the case in the news media" had the effect of excluding many persons from the county in which the incidents occurred and in which petitioner resided.

This occurred because of the extensive publicity which the case had generated in the St. Joseph County area. The automatic exclusion of prospective jurors who had "heard or read" anything about the case effectively diminished the number of prospective jurors from that area.

In fact, the Appellate Court, in its opinion, recognized, but disregarded, this effect of the trial court's position when it stated:

> "Although the exclusion may have had the effect of reducing the number of prospective jurors from a certain geographical area, the trial judge properly exercised his discretion as he attempted to protect the defendant from the potential prejudices that might have resulted from pretrial publicity." (Op. p. 3)

Although the District Court was well-motivated in its effort to conduct a trial in which only that evidence which passed muster under the Federal Rules of Evidence would influence jurors' minds, petitioner maintains that the judge's summary

dismissal of twenty-three prospective jurors, most of whom resided in the county of petitioner's residence, was improper. In this respect, it should be also noted that the South Bend-Mishawaka area (St. Joseph County) is primarily urban-industrial while the bulk of the Northern District of Indiana is rural. It is the responsibility of the trial court to insure that an impartial jury is selected to adjudicate on evidence as opposed to personal bias or preconceived notions, *United States v. Robbins*, 500 F.2d 650 (5th Cir. 1974). Yet, pursuit of this admittedly legitimate goal should be tempered when it clashes with the equally important duty of the court to refrain from "systematic and intentional exclusion of representatives of . . . any economic, social, religious, racial, political or geographic group of a community." *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946).

Failure to understand and apply these two principles together can only serve to erode the proper establishment of federal jury panels. Illustrative of the potential magnitude of this problem is the fact that most of the arguments advanced to date in Federal courts in opposition to geographic exclusion have been unsuccessful. *Zicarelli v. Gray*, 543 F.2d 466 (3rd Cir. 1976); *United States v. Florence*, 456 F.2d 46 (4th Cir. 1972); *United States v. DiTommaso*, 405 F.2d 385 (4th Cir. 1968); *Connelly v. United States*, 249 F.2d 576 (8th Cir. 1957). In *DiTommaso*, the court stated:

> "Geography, as a proper criterion for measuring jury selection, has more significance when it reflects urban versus rural representation. Defendants offered no statistics to disclose this division."

The court therefore implies that it is necessary for a defendant faced on the day of trial with such a position by the trial court to produce statistical evidence showing that he will be prejudiced by such an exclusion. Surely, *Thiel* does not mandate this . . .

The *DiTommaso* court continued:

> "Nor did they offer any basis for supposing that the urban residents of Montgomery and Prince George's Counties would think or react differently from residents of Baltimore City on matters that would likely be submitted to them as jurors."

The *DiTommaso* court fails to explain, however, why such a basis need be offered. It is highly doubtful that a court would demand that a basis be offered to show that Blacks would think or react differently from Whites on matters that would likely be submitted to them as jurors—or that indigents would think or react differently from wealthy people. Why geographic exclusion should be treated with less reverence than any of the others banned in *Thiel* remains a mystery.

A further aspect of this problem may be gleaned from *Connelly, supra*, a case in which the facts pertinent to the jury selection issue are virtually identical to those in the case at bar. There the court ordered the exclusion from the jury venire of all residents of St. Louis City and St. Louis County. In affirming the District Court, the Eighth Circuit unabashedly characterized this action as a "geographic exclusion". 240 at 583. Moreover, the court cited *Thiel* in support of its action!

This synopsis is indicative of the attitude which exists with respect to the meaning and significance of geographical exclusions in the jury selection process. It seems obvious that *Thiel* stands for the opposite result than that obtained in *Connelly* and in the case at bar; to hold that every citizen of St. Louis City or St. Louis County or St. Joseph County who was eligible for federal jury duty but who had read or heard anything about the case was incapable of rendering an impartial verdict simply makes no sense.

In *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), the Court noted that "the states remain free to prescribe relevant

qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community". This principle, however, is carried to a seemingly unreasonable extreme in situations in which not merely "identifiable segments" of the community are excluded but, in fact, a large portion of the population of a metropolitan area is effectively excluded.

In sum, this Court is urged to grant this petition in order to settle this troublesome and important area of geographic exclusions in the formation of federal jury panels, and thus to establish uniformity among the Circuits and to promote conformity with principles enunciated by this Court.

II

This Case Presents an Important and Unsolved Question Which Needs Resolution by the United States Supreme Court as to Precisely What Type of Participation in a Gambling Operation Constitutes an Offense Under 18 U.S.C. §1955 and Whether Someone Who Merely Permits Gambling to Take Place on His Premises Has Violated the Statute.

Petitioner was convicted of violating 18 U.S.C. §1955 largely on the basis of testimony which revealed, among other things, that he unlocked the door of Room 319 during Campagna's occupancy to permit entry by a food and drink hostess, and that he was on occasion observed within the room at a time when gambling was taking place. Yet, assuming arguendo that these allegations are true, the vital question remains as to whether such activity on the part of petitioner is sufficient to sustain a conviction under 18 U.S.C. §1955. It is obvious that petitioner had no connection with the operation prior to its nine-day existence at the Holiday Inn and that thereafter he

did no more than permit his lessee, Sam Campagna, to conduct the operation unimpeded.

Scattered densely among the appellate cases interpreting and applying Section 1955 is the statement that Congress intended to incorporate into the statute's prohibition all participants in the gambling business, except those who actually wagered, including high level bosses as well as street level employees, regardless of how minor their roles and whether or not they are labeled agents, inners, independent contractors, or the like. *United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973); *United States v. Becker*, 461 F.2d 230 (2nd Cir. 1972); *United States v. Palmer*, 465 F.2d 697 (6th Cir. 1972); *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974); *United States v. Jones*, 491 F.2d 1382 (9th Cir. 1974); *United States v. Joseph*, 519 F.2d 1068 (5th Cir. 1975); *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976). It should be carefully noted, however, that each of these cases in which that principle was advanced arose in a context involving a defendant who was actually involved in the gambling business *per se*. It would be absurd to dispute the fact that such individuals are precisely those at whom the section is aimed, especially in the case of managers of gambling operations. *United States v. Graham*, 534 F.2d 1357 (9th Cir. 1976). Nevertheless, whether one who clearly has nothing to do with gambling itself is within the intent of Congress' prohibition remains very nebulous. For example, in *United States v. Marrifield*, 515 F.2d 877, 882 (5th Cir. 1975) the court held that an individual could be held to have violated the statute with less than thirty days involvement if he "joins an ongoing operation where there has been five persons involved for a period in excess of thirty days and *replaces* one of the five". (emphasis supplied) While *Marrifield* involved an owner of a gambling establishment who actively managed and profited from the business, the case at bar involves no more

than an innkeeper who permitted gambling to take place in his establishment. Clearly, this distinction is material.

There are indications in several cases that one in the position of petitioner is not within the prohibition of the statute. For example, in *United States v. Guzek*, 527 F.2d 552 (8th Cir. 1975) and *United States v. Todaro*, 550 F.2d 1300 (2nd Cir. 1977), defendants' roles as persons who "supplied line information which might possibly have been used by those who ran the business" were characterized as that of a "comparative outsider" against whom a conviction for "conducting" an illegal gambling business could not stand. In *United States v. McCoy*, 539 F.2d 1050 (5th Cir. 1976), defendant who transmitted line information clearly was "no mere bettor". But did his conduct substantially affect the gambling business?

Clearly the application of the statute to petitioner must be at least in serious doubt given the situations above in which even one involved in gambling operations per se can be held not to have violated Section 1955. For example, the courts have consistently asserted that mere presence by one who has gambled but has not assisted in the operation of the games will not sustain a § 1955 conviction. Eg: *United States v. Box*, 530 F2d 1258 (5th Cir. 1976), *United States v. Schaefer*, 510 F2d 1307 (8th Cir. 1975).

Unfortunately, this court has not definitively addressed the question of what level of an individual's activity is sufficient to support a conviction under 18 U.S.C. § 1955 when that individual has not been associated with a gambling venture for more than thirty days and where he has not actively participated in the venture.

Thus, because of the substantial doubts herein raised as to exactly what activity constitutes "participation" in a gambling operation under 18 U.S.C. § 1955, the Supreme Court should grant this petition.

CONCLUSION

For each of the foregoing reasons, the Petition for Writ of Certiorari requested herein should be granted.

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APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 22, 1978

Before

Hon. WALTER J. CUMMINGS, CIRCUIT JUDGE

Hon. WILBUR F. PELL, JR., CIRCUIT JUDGE*

Hon. HARLINGTON WOOD, JR., CIRCUIT JUDGE

United States of America, Plaintiff-Appellee, No. 77-2060 vs. Julius C. Werbrouck, Jr., Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division, No. S 77-Cr-8 ALLEN SHARP, JUDGE

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

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* Although Judge Pell was a member of the panel at oral argument, he did not participate in the decision of this case.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

(Argued September 19, 1978)

November 22, 1978

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge*

Hon. HARLINGTON WOOD, JR., Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 77-2060 vs.

Julius C. Werbouck, Jr.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. S 77-Cr-8
Allen Sharp, Judge.

ORDER

The defendant, Julius C. Werbrouck, Jr., was indicted on April 13, 1977, for violation of federal gambling laws, 18 U.S.C. § 1955 and § 2, and was convicted by a jury on September 2, 1977.[1] The defendant raises numerous issues, most of which do not merit lengthy consideration.

[1] The district court imposed a two-year suspended sentence along with a fine of $20,000 and two years probation.

First we consider defendant's claim that there was insufficient evidence produced at trial to sustain the court's denial of his motions for judgment of acquittal or the jury's verdict of guilty. He specifically contends that there was neither sufficient evidence to establish his involvement with the gambling business as a principal or as an aider and abettor, nor to establish the jurisdictional requirement of substantially continuous operation of the enterprise in excess of 30 days.

In viewing the evidence and all reasonable inferences from it in the light most favorable to the Government, there is substantial evidence to affirm both the trial court's denial of the motions for acquittal and the jury's verdict of quilty. *Glasser v. United States*, 315 U.S. 60, 80 (1942). The evidence established that: (1) the defendant owned and operated the Holiday Inn Motel and the Lincoln Highway Inn Restaurant which adjoined; (2) the defendant moved out of his personal room at the Holiday Inn to allow the gambling casino to move in; (3) defendant permitted motel rooms to be physically altered for gambling purposes, including the building of partition walls and installation of a steel door, cameras, monitors and electronically controlled door locks; (4) defendant charged no rent for the casino rooms and regularly provided customers free food and drinks from his adjoining restaurant; (5) defendant held keys to the electronically controlled doors and admitted persons to the rooms; and (6) defendant was observed in the gambling casino. From these and other factual determinations the jury and trial court could plainly have decided that the defendant was guilty beyond a reasonable doubt of aiding and abetting a gambling operation or of conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business.

Defendant's objections regarding the 30-day jurisdictional requirement are also frivolous. In *United States v. Mattucci*, 502 F.2d 883, 889 (6th Cir. 1974), the court declared:

> The statute, 18 U.S.C. § 1955(b)(1)(iii) clearly makes the thirty day requirement a part of the definition of illegal gambling business and not a specific requirement as to the duration of individual participation by persons involved in such business.

From the record there was substantial evidence to support the conclusion that the Holiday Inn casino was a substantial continuance of the same illegal gambling operation which had begun at a different location five months earlier.

An issue the defendant also raises in this appeal is whether the trial judge erred in excluding all prospective jurors who admitted during *voir dire* that they had "read anything about this defendant or this case in the South Bend Tribune or in any other newspaper." The judge also asked, "Have any of you other than those who have just left heard or read about this case in any way from any other media, any other newspaper, the television or radio or received any other information about this case other than what you have heard here today from me in the course of these proceedings?" All persons responding affirmatively were excused. Defendant contends that by excluding 23 prospective jurors exposed to news accounts of the case, the court excluded a geographic group from the jury thereby denying his constitutional and statutory right to a trial by a jury reflecting a representative cross section of the community.

This argument is meritless. The requirement that an impartial jury be drawn from a cross section of the community "does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). In this case the exclusion of jurors was not a blanket exclusion of persons from a geographic area; indeed the jury that was selected in the present case included three members from the community in which the defendant lived. Although the exclusion may have had the effect of

reducing the number of prospective jurors from a certain geographic area, the trial judge properly exercised his discretion as he attempted to protect the defendant from the potential prejudices that might have resulted from pretrial publicity. *See generally, United States v. Barrett*, 505 F.2d 1091 (7th Cir.), *cert. denied*, 421 U.S. 964 (1975); *United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

Ironically, the defendant's next argument is that the trial court erred in not giving a jury instruction cautioning the jury against reliance on prejudicial publicity that appeared during the course of the trial. The defendant, however, never apprised the court of any prejudicial publicity nor requested such an instruction. It is clear that the burden is on the party seeking such an instruction to raise the issue before the trial court. *United States v. Pomponio*, 563 F.2d 659 (4th Cir. 1977), *cert. denied*, 98 S. Ct. 1520 (1978); *Margolis v. United States*, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969). Because the defendant failed to satisfy this burden, because the trial judge cannot be expected to read, see and hear all media coverage of a trial, and because there was no showing that the jury was in fact exposed to any of the publicity, we hold that no error was committed.

The defendant also asserts that the trial court erred in denying his motion to dismiss. The focus of this motion was that the defendant's gambling activity was local in nature and therefore did not provide interstate character sufficient to meet the federal jurisdictional requirements of 18 U.S.C. § 1955.[2] Here again

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[2] Counsel for defendant argued in his brief:

> This statute, particularly in its application to this case, does more to destroy the "federalism" concept upon which our great country has thrived for so long, and any other piece of legislation that comes to the mind of this writer, at least in the area of criminal law.
>
> No longer can the local police or local Prosecutor indulge in his time honored right to allow a local "game" or "book" continue to operate . . .

the law is clear; Section 1955 does not require a showing that the gambling activities of each defendant involved have affected interstate commerce. *United States v. Manson*, 494 F.2d 804 (7th Cir.), *cert. denied*, 419 U.S. 994 (1974).

The defendant further argued in his motion to dismiss that Section 1955 is unconstitutionally vague. This argument has already been rejected by the courts. *United States v. McCoy*, 539 F.2d 1050 (5th Cir. 1976), *cert. denied*, 431 U.S. 919 (1978); *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974).

The defendant further contends that the trial court erred in denying his demand for a preliminary hearing. Pursuant to Rule 5.1 of the Federal Rules of Criminal Procedure, a preliminary examination is not available to a defendant who has been indicted. The purpose of such a hearing is to determine probable cause and thus it is unnecessary after indictment as it has then been determined that probable cause exists. So it was in this case. *United States v. White*, 454 F.2d 435 (7th Cir. 1971), *cert. denied*, 406 U.S. 962 (1972); *United States v. Lauchli*, 444 F.2d 1037 (7th Cir.), *cert. denied*, 404 U.S. 868 (1971).

The defendant also argues that the trial court erred in denying his motion to suppress evidence of certain Holiday Inn registration and billing records. He complains that there was insufficient evidence before the magistrate to support a finding of probable cause for the search, especially because the search occurred at night. The affidavit which accompanied the search warrant was nine pages long and included detailed observations of FBI Agent Naum who had gambled at the casinos on numerous occasions in an undercover capacity. Having reviewed the affidavit, we are of the opinion that it provided reliable, detailed information sufficient to constitute probable cause. *Aquilar v. Texas*, 378 U.S. 108 (1964). As to defendant's objection to the authorized nighttime search which commenced at 10:00 p.m., we find the timing of the search to be reasonable because,

as the affidavit stated, the casino operated only in the evening between 8:00 p.m. and 2:00 a.m. Thus the trial court was correct in denying the defendant's motion to suppress.

We consider lastly whether the trial court erred in prohibiting the defendant from attempting to impeach a Government witness through specific instances of misconduct. David Andrews, an insurance salesman, was one of three Government witnesses who testified that the defendant was present at the gambling casino. The defendant attempted to introduce evidence that Andrews had been discharged from the South Bend Police Department seven years earlier for misconduct. Specifically the defendant attempted to introduce findings by the Board of Public Works and Safety of South Bend, Indiana, which described an incident in which Andrews had planned to have friends plant marijuana on certain persons whom Andrews would then arrest.

The defendant failed to interrogate Andrews regarding these incidents and claimed that when he cross-examined Andrews he was unaware of the impeaching information. The day after Andrews testified the defendant called Sheppard Crumpacker, former city attorney for South Bend, and attempted to introduce the alleged impeaching information through him. The district court properly prohibited its introduction.

The defendant first contends the evidence should have been admitted under Rule 609 of the Federal Rules of Evidence which permits impeachment by use of prior convictions of certain types of crimes. The impeaching information defendant attempted to introduce, however, was not a record of the conviction of a crime. It was merely a set of findings by the Board of Public Works and Safety which resulted in Andrews' discharge from the Police Department. The distinction is significant. A criminal conviction entails a finding of guilty beyond a reasonable doubt in a forum which abides by specific rules of evidence and procedure designed to protect the defendant. The findings of a municipal administrative forum such as the Board of Public Works

and Safety clearly do not fit within the language or intent of Rule 609.

The defendant next argues that the impeaching information should have been admitted through Crumpacker under Rule 608(b).[3] The rule is clear on its face that specific instances of conduct may be proved by extrinsic evidence, in the discretion of the district court, but only on cross-examination. If the Government witness had testified as to the credibility of a former witness, the defendant on cross-examination could have inquired into specific instances of conduct. Here Crumpacker had not testified for the Government but was called by the defendant in a collateral attack upon the credibility of a prior government witness.

The defendant argues that the district court should have exercised its inherent judicial discretion and permitted the information to be admitted through Crumpacker on direct examination because the defendant was not prepared to cross-examine Andrews and thus could not follow the proper procedure of confronting Andrews with the alleged impeaching information on cross-examination. This reasoning is premised on the defendant's contention that Andrews was a "surprise witness" precluding the defendant from preparing an effective cross-examination. The record, however, does not support this premise. Prior to trial, the district court judge read to counsel and the jury a list

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[3] Rule 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness; or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

of potential witnesses, one of whom was Andrews. Accordingly Andrews could not be classified as a "surprise witness."

The defendant then called and attempted to introduce the alleged impeaching information through Kenneth McDonald. On direct the defendant questioned McDonald regarding Andrews' reputation. On redirect, however, the defendant sought to elicit testimony regarding specific instances[4] of Andrews' conduct, but the court sustained the Government's objections. Again Rule 608(b) is clear that such inquiries may be made during cross-examination and thus the court correctly sustained the Government's objection.

The defendant's final try to introduce the alleged impeaching information was through Government witness Michael Borkowski, Chief of Police of South Bend, who testified to a prior high departmental rating of Andrews' character. On cross-examination the defendant elicited from Borkowski that Andrews had been discharged from the police force, but the court would not permit the defendant to inquire into the specific charges for which Andrews was discharged. The defendant does not argue that the trial court abused its discretion but rather he contends a "discretionary error" resulted.

The trial court has wide discretion in determining the scope of cross-examination and the admissibility of evidence. Here Rule 608(b)(2) gave the trial court discretion to permit a party to inquire into specific instances of conduct on cross-examination if probative of truthfulness or untruthfulness. Assuming *arguendo* that the court erred by not allowing the defendant to ask Borkowski about the details of the discharge, the error was harmless because even if the inquiry was permitted Borkowski's answer would have been that he lacked any knowledge about the

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[4] The findings of the Board of Public Works and Safety of South Bend.

discharge. *See United States v. Ling*, No. 76-1728 (4th Cir. Aug. 30, 1978). This is evident from the record because when the defendant cross-examined Borkowski he asked, "Well, it's a fact that he (Andrews) was fired for misconduct of some type; right?" Borkowski's response was, "I have no knowledge whatsoever, Mr. Stephan, of his discharge." The point was made that Andrews had been fired. Only the details were lacking in the evidence. Two other Government witnesses linked the defendant to the gambling casino, thus diminishing the importance of Andrews testimony. "In ruling on evidentiary matters, the trial judge must balance the probative value of testimony against potential prejudice, and his exercise of discretion will not be disturbed on appeal save for grave abuse." *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973). Accordingly, the possibility of error, if any, in the present case is not so grave as to constitute reversible error.

For the above reasons the jury verdict is affirmed.

AFFIRMED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 22, 1978

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge*

Hon. HARLINGTON WOOD, JR., Circuit Judge

United States of America,
Plaintiff-Appellee,

No. 77-2060 vs.

Julius C. Werbrouck, Jr.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. S 77-Cr-8

Allen Sharp, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Although Judge Pell was a member of the panel at oral argument, he did not participate in the decision of this case or in the consideration of the petition for rehearing.

Supreme Court of the United States

No. A-641

JULIUS C. WERBROUCK, JR.,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 19, 1979.

/s/ JOHN PAUL STEVENS
Associate Justice of the Supreme
Court of the United States

Dated this 18th day of January, 1979.